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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Jeffrey Timothy Landrigan, Petitioner, vs. Ernest Trujillo, Warden, Arizona State Prison Complex-Eyman; and Charles L. Ryan, Director of the Arizona Department of Corrections, Respondents.	No. **PETITION FOR A WRIT OF HABEAS CORPUS** (28 U.S.C. § 2254) (Death Penalty Case)

The prosecution's theory at Arizona death-row prisoner Jeffrey Landrgian's trial for first-degree murder was that the perpetrator had sex with the victim before killing him during a bloody struggle. Preliminary postconviction DNA testing results now confirm the prosecution's theory. But the prosecution was wrong about one critical fact—Landrigan was not the perpetrator, as those test results also confirm. The sentencing judge's finding that Landrigan was the actual killer thus lacks a factual basis and must be revisited.

The Ninth Circuit Court of Appeals authorized Landrigan to file this second or successive application for a writ of habeas corpus and stayed his execution—which had been scheduled for October 26, 2010—to allow this Court to consider his application. *See* 9th Cir. R. 22-3(f).

The sentencing judge found that Landrigan was the actual killer and thus eligible for the death penalty under *Enmund v. Florida*, 458 U.S. 782 (1982). In this petition, Landrigan asserts that the results of postconviction DNA testing results entirely vitiate the sentencing judge's *Enmund* eligibility determination, and that the Arizona state courts incorrectly rejected his claim that he is not eligible for the death penalty under either *Enmund* or *Tison v. Arizona*, 481 U.S. 137 (1987). This Court must therefore grant the writ as to Landrigan's death sentence and order the Arizona state courts to make proper findings under *Enmund* and *Tison*.

Jurisdiction and Venue

This Court has jurisdiction to entertain this petition under 28 U.S.C. § 2254, because Landrigan is seeking relief from custody that violates the United States Constitution; and under 28 U.S.C. § 2244(b) because the court of appeals authorized him to file this petition. *See Burton v. Stewart*, 549 U.S. 147, 152 (2007) (per curiam). Venue is proper in this Court under 28 U.S.C. § 1391.

Parties

Petitioner Jeffrey Timothy Landrigan is an Arizona death-row prisoner incarcerated at Arizona State Prison Complex-Eyman.

Respondent Ernest Trujillo is the warden of Arizona State Prison Complex-Eyman. He is directly responsible for Landrigan's custody and directly supervises all Arizona executions.

Respondent Charles L. Ryan is the Director of the Arizona Department of Corrections. He oversees all prisons in Arizona as well as the preparations for all Arizona executions.

Exhaustion of State-Court Remedies

As explained below, Landrigan has exhausted his state-court remedies with respect to the claim included in this petition.

Factual Background

The last time that Tim Fincher saw Chester Dean Dyer, the victim in this case,

was the day that Fincher gave Dyer his paycheck—Wednesday, December 13, 1989. (TR 6/25/90 at 46) After Dyer failed to show up for work on each of the next two days, Fincher took Charles Hitchings, another coworker, over to Dyer's apartment. (TR 6/25/90 at 47) Fincher jimmied open the lock to Dyer's apartment, then entered and found Dyer sprawled out across the bed. (TR 6/25/90 at 47) Fincher had Dyer's apartment manager summon the fire department and the police. (TR 6/25/90 at 47)

Officer Michael Chambers responded to the call and went to Dyer's studio apartment. (TR 6/19/90 at 74-75) Chambers noticed Dyer's body lying face down on the bed. (TR 6/19/90 at 82) The right arm was "off the bed and somewhat upward. The head was off the bed. The left arm was under the body and the body was clothed." (TR 6/19/90 at 82) The body was dressed in a shirt, jeans, and tennis shoes. (TR 6/19/90 at 83) The shirt was "pulled up at the waist toward the shoulders." (TR 6/19/90 at 100) A length of "appliance wire" or "electrical cord" was hanging from the back of the neck. (TR 6/19/90 at 94, 106) To the left of the body was a small Phillips screwdriver. (TR 6/19/90 at 100)

While he was at Dyer's apartment, Chambers noticed a shoeprint in a pile of sugar. (TR 6/19/90 at 86) Shoeprint technicians with the police department made a cast of the shoeprint. (TR 6/19/90 at 87-89) After reviewing a catalog, Chambers determined that the cast impression of the shoe was similar to an Adidas Torsion model shoe. (TR 6/21/90 at 4) Chambers circulated a bulletin to the other police officers on patrol in the neighborhood where Dyer's apartment was located. (TR 6/21/90 at 5)

Based on that bulletin, Chambers made contact the following Saturday, December 23, with an individual who identified himself as "Jeffrey Page." (TR 6/21/90 at 6-7) Chambers eventually came to know "Jeffrey Page" as Landrigan. (TR 6/21/90 at 42) During an interview with Landrigan, Chambers took a pair of Adidas Torsion model shoes from Landrigan. (TR 6/21/90 at 11)

Chambers sent a number of items to the crime lab, including a strand of hair;

Dyer's shirt, jeans and socks; and curtains from Dyer's apartment. (TR 6/21/90 at 13, 15) Chambers also described a fingernail that Detective Fuqua had found on top of the bed in Dyer's apartment. (TR 6/21/90 at 30, 45; Exhibit M) The existence of this fingernail was not disclosed to the defense until the fourth day of Landrigan's trial. (TR 6/21/90 at 46) Detective Fuqua's report also described hairs found in, or perhaps on, Dyer's hand—hairs that he "removed and secured for later analysis." (Exhibit M at 5) None of these items were subjected to any kind of testing before trial.

On Saturday, December 16, Dr. Fred Walker performed an autopsy on Dyer's body. (TR 6/25/90 at 27) The body was clothed in a shirt, blue jeans, and white cotton socks when Dr. Walker began to examine it. (TR 6/25/90 at 28) He noticed that there was some blood on the victim's pants, but did not know whether that blood was the victim's. (TR 6/25/90 at 40) Dr. Walker did not determine the victim's blood type. (TR 6/25/90 at 40) Dr. Walker was unsure whether he received any hairs, but was sure that he did not receive any fingernail. (TR 6/25/90 at 41)

Evidence at trial showed that Landrigan *had* been in Dyer's apartment once. On the evening of Tuesday, December 12, the day before Dyer was killed, Landrigan placed three long-distance telephone calls from Dyer's apartment—two to the home of his birth mother in Yuma, Arizona; and one to the home of his adoptive parents in Bartlesville, Oklahoma. (TR 6/26/90 at 56-57, 66-67)

Karen Jones, a fingerprint examiner working for the police department, compared latent fingerprints found in Dyer's apartment to fingerprints of known suspects. (TR 6/21/90 at 70) Jones received 63 latent fingerprints and compared them all to a known fingerprint given by Landrigan. (TR 6/21/90 at 72-74) Only seven matched Landrigan (TR 6/21/90 at 77); these came from the refrigerator door, the toilet tank lid, the bottom of a dinner plate, the plastic wrapper on a loaf of bread, and a jar of mayonnaise (TR 6/21/90 at 77; 6/25/90 at 7, 15-16, 18). Jones did not match any of the 63 latent prints to any other known prints provided by potential suspects. (TR 6/21/90 at 77) She could not recall comparing any of the latent prints

to any "other people." (TR 6/21/90 at 73) Nor has the State of Arizona, since Landrigan's trial, ever compared these other prints against prints in law enforcement databases in an effort to identify other potential suspects.

Inta Meya, who worked at the crime laboratory, examined the shoes that Chambers took from Landrigan. (TR 6/26/90 at 6; TR 6/21/90 at 11-12) Based on an "individual characteristic" on one of the shoes (TR 6/26/90 at 10), Meya concluded that Landrigan's shoe left the print in the pile of sugar at Dyer's apartment. (TR 6/26/90 at 9-10) The right shoe had some blood on it, and Meya determined that it was human blood, Type A. (TR 6/26/90 at 11)

Meya also tested the shirt that Dyer was wearing. (TR 6/26/90 at 12; TR 6/21/90 at 15) But she did not perform any test on the shirt to determine whether human blood was present on it—she simply assumed that it was human blood and that such tests were "not necessary." (TR 6/26/90 at 13) In fact Meya's assumptions reached more broadly. Not only did she assume that the blood on the shirt was human blood, she even assumed that it was Dyer's blood. (TR 6/26/90 at 18) But she did not have a sample of Landrigan's blood. (TR 6/26/90 at 18) She did not have a sample of Dyer's blood, so she couldn't have known whether it was Type A. (TR 6/26/90 at 16-17) She did not know whether the blood on the shirt came from Dyer. (TR 6/26/90 at 20) And so she had no way of knowing whether the "blood on the shoe came from the same person as the blood on the shirt." (TR 6/26/90 at 20)

After his arrest, Landrigan was held in custody to await trial. From jail, Landrigan made a call to his then-girlfriend, Cheryl Smith. (TR 6/21/90 at 52) On direct examination at Landrigan's trial, Smith explained that Landrigan told her that he was in jail for murder because he "killed a guy," "killed him with his hands," and that there was someone else present with him but that "that guy got away." (TR 6/21/90 at 52) On cross-examination, Smith admitted that she couldn't remember Landrigan telling her that he had been charged with murder. (TR 6/21/90 at 55) She also explained that while she was talking to Landrigan, it seemed as if there were

"lots of people around." (TR 6/21/90 at 56) She explained that Landrigan had told her that he was calling her from jail (TR 6/21/90 at 57), but she also said that she thought Landrigan was lying to her about being in jail (TR 6/21/90 at 56). She further explained that Landrigan said, "No I didn't do it, another guy did it." (TR 6/21/90 at 57) Finally, Smith explained that she lied to Landrigan throughout their conversation. (TR 6/21/90 at 58)

The prosecution's theory at trial was that Dyer invited Landrigan over to his apartment where they had sex, then got dressed, and then Landrigan strangled Dyer to death during a bloody struggle. (TR 6/27/90 at 4-19) Based on that theory of the case, Landrigan was charged with and convicted of committing first-degree murder solely on the basis of felony murder. (TR 6/19/90 at 4; TR 6/27/90 at 6, 49) *See State v. Landrigan*, 859 P.2d 111, 115 (Ariz. 1993) (holding that the evidence at trial was sufficient to sustain the first-degree murder charge on a felony-murder theory).

Before the sentencing hearing, neither party challenged Landrigan's eligibility for the death penalty on the ground that Landrigan was neither the actual killer, *see Enmund v. Florida*, 458 U.S. 782, 797 (1982), nor was he a major participant in the underlying felony who exhibited reckless indifference to human life, *see Tison v. Arizona*, 481 U.S. 137, 158 (1987). The sentencing judge nevertheless spontaneously addressed the issue:

> The Court finds from the evidence introduced at trial, the evidence at the sentencing hearing and the entire case, and with particular regard to the testimony of Cheryl Smith that she had a conversation with the defendant when he indicated that he murdered someone, the Court finds that the defendant was the actual killer, that he intended to kill the victim and was a major participant in the act. Although the evidence shows that another person may have been present, the Court finds that the blood spatters on the tennis shoes of the defendant demonstrate that he was the killer in this case.

(Exhibit S) The judge found Landrigan to be the actual killer—and thus eligible for the death penalty under *Enmund*—without acknowledging the total lack of connection between the blood on Landrigan's shoe and the blood on Dyer's shirt, without addressing the obvious credibility problems associated with Cheryl Smith's

admission that she is a liar, and without identifying any other evidence in the record to support the conclusion. She then sentenced Landrigan to death. Landrigan did not challenge the sentencing judge's *Enmund* eligibility finding on direct appeal.

Procedural History

Landrigan was sentenced to death on October 25, 1990. The Arizona Supreme Court later affirmed Landrigan's conviction and sentence on grounds not related to the sentencing judge's *Enmund* finding. *See State v. Landrigan*, 859 P.2d 111 (Ariz. 1993). That court later denied a petition for review from the denial of a petition for postconviction relief. That petition raised other claims not implicated here.

In the summer of 2006, Landrigan sought an order from the Maricopa County Superior Court authorizing him to conduct postconviction DNA testing on the fingernail and the hairs found on or in Dyer's hand. (Exhibit A) *See* Ariz. Rev. Stat. § 13-4240. A year later, after learning that the fingernail and hairs had been lost, Landrigan asked the court to allow him to conduct DNA testing on Dyer's jeans, the blanket on his bed, and the curtains in his apartment. (Exhibit D) Landrigan forwarded these items, along with the curtains from Dyer's apartment and a buccal swab obtained from Landrigan, to Technical Associates Incorporated (TAI) of Ventura, California, for testing. (Exhibit P at 1)

TAI tested multiple semen and blood stains that were on Dyer's jeans and on the blanket on Dyer's bed, and also tested multiple blood stains on the curtains.[1] (Exhibit P at 2-3) On April 22, 2008, TAI reported[2] that Landrigan is excluded as a contributor of any of the DNA from the semen or blood. (Exhibit P at 8) The testing showed DNA profiles of at least two other individuals. (Exhibit P at 8-13) These

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[1]Although TAI performed some initial tests suspected blood stains, it did not subject the blood stains on the jeans to DNA analysis. TAI is completing that testing now, and has issued preliminary results of that testing (Exhibit R).

[2]TAI's report describes the items it tested, the chain of custody of those items, and the method used to determine the DNA test results.

results flatly contradict the prosecution's theory at trial—that Landrigan had sex with the victim, then afterward strangled him to death during a bloody struggle. Even though the DNA test results implicate two other individuals in this bloody struggle that led to a man's death, the State of Arizona has made no effort to match these DNA profiles to those stored in any law enforcement DNA database.

Under Arizona's postconviction DNA testing statute, if the results of such testing "are favorable to the petitioner, the court shall order a hearing." Ariz. Rev. Stat. § 13-4240(K). Three months after TAI issued its report, Landrigan amended a pending petition for state postconviction relief to include a request for an evidentiary hearing under § 13-4240(K) in view of the favorable results of the DNA testing. (Exhibit F) On August 10, 2009, the court denied Landrigan a hearing on the ground that the parties did not "dispute the facts established by DNA testing of the victim's pants" (which undoubtedly were "favorable" to Landrigan) and that therefore there were "no issues of material fact left to be determined by an evidentiary hearing." (Exhibit H at 3) That same day, Landrigan moved to amend his pending petition for state postconviction relief for a second time, asserting a claim that the results of the DNA testing showed that the sentencing judge erroneously concluded that Landrigan was eligible for the death penalty under *Enmund*. (Exhibit G)

On October 8, 2009, the Maricopa County Superior Court dismissed Landrigan's petition for postconviction relief. Noting that it had previously ruled that an evidentiary hearing was not required, the court further ruled:

> The DNA evidence would not have changed the trial judge's death verdict. Both the trial judge and the Supreme Court, independently reviewing the propriety of the death sentence, determined that the record did not present mitigating evidence sufficiently substantial to call for leniency. If an accomplice was involved in the murder and the defendant believed he was less culpable, he could have presented this fact as mitigation at his sentencing hearing. He chose not to present mitigation and that choice was upheld by the United States Supreme Court.

(Exhibit I at 5) In its October 8 order, the court did not address Landrigan's request to amend his petition to include a challenge to the sentencing judge's *Enmund*

eligibility determination. Later, however, the court clarified that its October 8 order disposed of that request. (Exhibit J at 1) Landrigan asked the Arizona Supreme Court to review the postconviction court's denial of his *Enmund* claim, but that court summarily declined to do so. (Exhibit K) On October 4, 2010, the United States Supreme Court declined to review the Arizona Supreme Court's ruling. *See Landrigan v. Arizona*, No. 10-5280, 2010 WL 2717732 (U.S. Oct. 4, 2010).

First Claim for Relief

Landrigan is not eligible for the death penalty under the Eighth Amendment because newly discovered DNA evidence demonstrates that he neither was the actual killer nor was a major participant in the underlying felony who exhibited reckless indifference to human life.

Because Landrigan was convicted of felony murder, *see Landrigan*, 859 P.2d at 115, the Eighth Amendment forbids executing him unless an additional culpability determination is made. In order for a felony-murder defendant to be eligible for the death penalty, he must be the actual killer, or have attempted or intended to kill. *See Enmund*, 458 U.S. at 797. The *Enmund* eligibility requirement can also be met with a showing that the defendant was a major participant in the underlying felony who exhibited reckless indifference to human life. *See Tison*, 481 U.S. at 158. Furthermore, the Eighth Amendment requires that the Arizona state courts make the *Enmund/Tison* eligibility finding in the first instance. *See Cabana v. Bullock*, 474 U.S. 376, 391 (1986).

A. Landrigan obtained these newly discovered DNA test results by exercising due diligence.

The sentencing judge based her *Enmund/Tison* finding on two bits of trial evidence—the blood on Landrigan's shoes and the testimony of Cheryl Smith, an admitted liar, who said that Landrigan told her that he had killed a man. (Exhibit S) But newly discovered DNA evidence—evidence that could not have been previously discovered through the exercise of due diligence—shows that Landrigan's blood was not found on the victim's clothing. This fact demonstrates that the blood on

Landrigan's shoes had no bearing on the sentencing judge's *Enmund* determination, and also shows that the sentencing judge's reliance on Smith's testimony was entirely erroneous.

In April 2000, the Arizona legislature enacted a statute that provided for postconviction DNA testing of "any evidence that is in possession or control of the court or the state, that is related to the investigation or prosecution that resulted in the judgment of conviction, and that may contain biological evidence." S.B. 1353, 44th Leg., 2d Sess., 2000 Ariz. Legis. Serv. ch. 353 (Ariz. 2000), *codified at* Ariz. Rev. Stat. § 13-4240(A). Before seeking DNA testing under this statute, the defendant who seeks testing must demonstrate to the court that the evidence he seeks to have tested still exists. *See* Ariz. Rev. Stat. § 13-4240(B)(2).

In the fall of 2000, under the auspices of Arizona's new postconviction DNA testing statute, Lisa Eager, an investigator with the office of the Federal Public Defender for the District of Arizona, contacted the Phoenix Police Department to determine whether the hair and the fingernail that were found in Dyer's apartment still existed. (Exhibit Q ¶¶ 2-3) Eager discovered that the Phoenix Police Department could not account for these items because the evidence was "gone." (Exhibit Q ¶ 5) The property room told Eager that the items had been used as court exhibits and were missing. (Exhibit Q ¶ 7) The Phoenix Police Department promised to give Eager a statement on its letterhead indicating that the hair and fingernail had gone missing but never followed through on its promise. (Exhibit Q ¶ 5; Exhibit N)

Meanwhile, Landrigan obtained relief from his death sentence in the Ninth Circuit. *See Landrigan v. Schriro*, 441 F.3d 638 (9th Cir. 2006) (en banc), *rev'd*, 550 U.S. 465 (2007). Believing still that DNA testing might exonerate him of guilt, Landrigan formally requested from the trial court authorization to conduct postconviction DNA testing of the hair and fingernail under Arizona's statute. (Exhibit A) The Arizona Attorney General's Office responded to Landrigan's request and informed the court that the hair and fingernail were available to be tested.

(Exhibit B) Based on that representation, the court ordered the DNA testing to be conducted. (Exhibit C)

Eager then contacted the Phoenix Police Department and asked to have the hair and fingernail sent out for testing. (Exhibit O ¶ 3) The Phoenix Police Department had recently completed an inventory of its freezers, but could not find the hairs or fingernail. (Exhibit O ¶ 6) Finally on January 29, 2007, the Phoenix Police Department admitted that the hair and fingernail not only were lost but might also never have been included in initial processing of the forensic evidence in this case. (Exhibit N)

Thus the Phoenix Police Department confirmed that the most important physical evidence that it had recovered from the crime scene would never be tested. Landrigan then asked the superior court to expand its DNA testing order to include Dyer's jeans, the blanket from his bed, and the curtains from his apartment. (Exhibit D) The court did so. (Exhibit E) Eager then sent the jeans, the blanket, and the curtain to TAI for testing. (Exhibit O ¶ 21) On April 22, 2008, TAI formally reported that Landrigan was excluded as a source of any DNA found on those items. (Exhibit P at 8-13)

Due to an unintentional oversight, TAI did not complete a DNA analysis of the blood found on Dyer's jeans. Its 2008 report was therefore necessarily incomplete. At Landrigan's request, the Maricopa County Superior Court then released the jeans back to TAI so that TAI could complete the testing that the court had ordered in 2007. (Exhibit Q at 1) On October 20, 2010, TAI provided preliminary results of its new round of testing.

The results of TAI's previous testing showed the presence of two individuals, who TAI identified as Individual #1 and Individual #2. Individual #1 was the source of the blood on the curtains; Individual #2 was the source of the semen on the blue jeans, which was found on the inside front button-hole area of the jeans; both were the source of blood and semen on the blanket. (Exhibit P at 8-13) However, that

information did not permit any conclusions as to the identity of the victim or the perpetrator. Although the testing suggested that the person whose semen was on the jeans would have been the victim—after all, the victim would be expected to have contributed the majority of semen and sperm to clothing he was wearing—without additional confirmation, that conclusion was arguable. Thus, any concomitant conclusion that the other individual was the perpetrator was equally reasonable, but arguable. The new results, however, provide confirmation of those conclusions.

1. The new results of tests on the blood on the blue jeans indicate that Individual #2 can be classified as the victim.

The results of the new DNA tests, combined with the information from the previous testing, allow the assignment of Individual #2 as the victim. This is so because the *new* test results demonstrate that the blood on the jeans reflects the same profile as that previously identified from the semen on the jeans: Individual #2. That is, the victim was found in the jeans that contained not only semen, but also blood from a single primary donor: Individual #2. (Exhibit R ¶¶ 23-25) That same person, Individual #2, also contributed the majority of the blood and semen on the blanket on which the victim was lying. (Exhibit R ¶¶ 19-21)

Thus, because the profile of the blood on the jeans and of the semen both reflect the presence of Individual #2, then the victim, the person who was actually wearing the semen-stained jeans, and who was bleeding from wounds acquired during a violent struggle (*e.g.* TR 6/21/90 at 24-25), is reasonably identified as Individual #2. Without the newly reported results of tests on the blood, this conclusion would not be possible.

2. The new results of tests of the blood on the blue jeans indicate that Individual #1 can be classified as the perpetrator.

Not only do the new results of the blood on the jeans permit the recognition of Individual #2 as the victim, but those results also confirm the identify of Individual #1 as the perpetrator. Individual #1 is the *only* contributor of the DNA profile found in the blood on the curtain. (Exhibit R ¶ 17) Individual #1 also contributed to the

blood and semen on the blanket. (Exhibit R ¶¶ 20-21) Finally, the new results indicate that the perpetrator, who bled on the curtains and on the blanket, also contributed blood to one of the stains on the victim's blue jeans.[3]

3. The new results from the testing of the blood on the jeans demonstrate that the perpetrator—not Landrigan—had sex with the victim and then killed him.

These results confirm the prosecution's theory at trial—with one crucial exception. The prosecution alleged that the victim and the perpetrator had sex, then had a violent struggle. (Exhibit F at 29; *see also* TR 6/27/90 at 12-14) The DNA test results provide clear evidence of sex and violence. The victim, Individual #2, left semen on his jeans and on the blanket, and he bled on both the jeans and the blanket; the perpetrator left semen on the blanket, and left blood on the curtains, on the blanket, and on one area of the victim's jeans. But these results also provide clear evidence that, contrary to the prosecution's theory, *Landrigan did not participate* in either of the activities that the prosecution alleged led to the death of the victim. Landrigan was not the actual killer.

This Court must dismiss Landrigan's claim unless "the factual predicate for the claim could not have been previously discovered through the exercise of due diligence." 28 U.S.C. § 2244(b)(2)(B)(i); *see also Thompson v. Calderon*, 151 F.3d 918, 935 n.11 (9th Cir. 1998) (Reinhardt, J., concurring and dissenting). Here, Landrigan diligently sought to learn from the Phoenix Police Department whether it still had the hair and fingernail available for testing and to conduct DNA testing on Dyer's jeans, blanket, and curtains. Soon after Arizona enacted its postconviction DNA testing statute, Landrigan began to investigate whether this evidence still

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[3]Additionally, there are low levels of alleles from other individuals present in some of the samples; Landrigan is excluded as a source of any of the DNA found in the samples. (*See, e.g.*, Exhibit R ¶¶ 19, 20, 23, 24) The source or sources of these alleles are inconclusive, except for the presence of Individual #1 as a contributor to one blood stain.

existed—a necessary step for obtaining judicial authorization to conduct the necessary testing. The Phoenix Police Department is largely responsible for the more-than-six-year delay between the time that Landrigan initially asked it to locate this evidence and the time it finally concluded that the evidence had been irretrievably lost. Thus, Landrigan exercised reasonable diligence in obtaining the newly discovered DNA evidence in time to present it to the state courts in a manner that would allow them to grant relief from his death sentence. Thus Landrigan's claim survives the diligence requirement in § 2244(b)(1)(B)(i). *See Quezada v. Scribner*, 611 F.3d 1165, 1167-68 (9th Cir. 2010) (equating "due diligence" with reasonable diligence).

B. The newly discovered DNA evidence, taken together with the evidence presented at trial and the findings of the sentencing judge, demonstrates that the sentencing judge's *Enmund* eligibility determination was erroneous.

In order to grant relief on this claim, this Court must also determine that the facts underlying it, "viewed in light of the evidence as a whole," are "sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." 28 U.S.C. § 2244(b)(2)(B)(ii). Legal determinations made by state courts are ordinarily subject to the limitation on relief set forth at 28 U.S.C. § 2254(d). *See Cooper v. Brown*, 510 F.3d 870, 919-20 (9th Cir. 2007). As Landrigan will explain, the Arizona courts did not expressly address this properly raised claim for relief. This Court must therefore independently review the state-court record to see whether § 2254(d) precludes relief. *See Delgado v. Lewis*, 223 F.3d 976, 981-82 (9th Cir. 2000).

Two decisions of the Maricopa County Superior Court relating to Landrigan's postconviction petition constitute the last reasoned state-court decision on this claim and are therefore relevant for assessing the proper level of deference under § 2254(d). *See Stanley v. Schriro*, 598 F.3d 612, 623 n.7 (9th Cir. 2010). First, the superior court

ruled that the new "DNA evidence would not have changed the trial judge's death verdict" because the fact that an accomplice may have been involved could have been presented as mitigating evidence, which in the court's view Landrigan chose not to present. (Exhibit I at 5) Second, the superior court emphasized that the October 8 ruling was meant to address "all the pleadings" filed in his postconviction case, specifically including the request to amend the petition to include a death-eligibility challenge based on *Enmund* and *Tison*. (Exhibit J at 1) The superior court never expressly indicated whether it was denying that request on procedural grounds relating to the timeliness of the request to amend or on the merits of the *Enmund/Tison* challenge. This Court therefore must presume that the superior court denied the *Enmund/Tison* claim on the merits. *See Murdoch v. Castro*, 609 F.3d 983, 989 (9th Cir. 2010) (en banc). But because the superior court never articulated a reasoned basis for denying the claim on the merits—indeed, it never even acknowledged that Landrigan was challenging his *eligibility* for the death penalty and not the sentencing judge's *selection* of that penalty for him—this Court must independently review that court's rejection of his *Enmund/Tison* challenge. *See Delgado*, 223 F.3d at 981-82.

The sentencing judge found Landrigan eligible for the death penalty under *Enmund* only. That is, she concluded only that Landrigan was the actual killer (Exhibit S), and thus did not base her conclusion on the equivalent finding of major participation and reckless indifference to human life. *See Tison*, 481 U.S. at 158 ("Rather, we simply hold that major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the *Enmund* culpability requirement."). She concluded that Landrigan was the actual killer because (1) there was blood on his shoes and (2) he told Cheryl Smith, an admitted liar, that he had killed someone. (Exhibit S) But those findings were unsupported by any evidence presented at trial, as the new DNA evidence now confirms.

The fact that there was blood on Landrigan's shoe is inconsequential. Inta

Meya, the police crime lab employee who tested the blood found at the scene, didn't have a sample of Landrigan's blood. (TR 6/26/90 at 18) The results of the postconviction DNA testing now show that even if Meya had had a sample of Landrigan's blood, she would not have been able to connect it to the victim. Because the DNA evidence excludes Landrigan as the source of the blood on the victim's clothing, the sentencing judge had no basis for connecting the blood on Landrigan's shoe to the blood on Dyer's jeans and blanket. The DNA evidence thus clearly demonstrates that the sentencing judge erred when she concluded that Landrigan was the actual killer in this case.

The DNA evidence therefore also demonstrates the sentencing judge's folly in believing the testimony of Cheryl Smith. Smith testified that during her conversation with Landrigan while he was in jail, he lied to her and she lied to him. She testified on direct examination that Landrigan told her he had "killed a guy" (TR 6/21/90 at 52), but she also testified on cross-examination that Landrigan told her that someone else had done it (TR 6/21/90 at 57). The sentencing judge thus confronted directly contradictory statements from an admitted liar and nevertheless chose to believe that Landrigan was the actual killer. Given that the DNA evidence affirmatively excludes Landrigan as the source of any blood on Dyer's clothing, the sentencing judge's reliance on Smith's testimony to make her *Enmund* finding renders that finding constitutionally erroneous.

In view of the DNA evidence, the sentencing judge's *Enmund* finding cannot withstand intrinsic review; thus, the postconviction court's rejection of Landrigan's *Enmund/Tison* claim is based on an unreasonable determination of the facts. *See* 28 U.S.C. § 2254(d)(2); *Taylor v. Maddox*, 366 F.3d 992, 999-1000 (9th Cir. 2004). No reasonable appellate panel applying the usual standards of appellate review would have upheld the sentencing judge's *Enmund* finding in light of the new DNA evidence. There was no basis in the trial testimony to connect any blood on Landrigan's shoe to Dyer; the police crime lab did not have a sample of Dyer's blood,

and the new DNA evidence now demonstrates that neither Landrigan's blood nor his semen was found on the victim's jeans and blanket. Any appellate court sitting in direct review of the sentencing judge's *Enmund* finding would therefore have had to reverse it for clear error. *See, e.g.*, *Riggs v. Fairman*, 399 F.3d 1179, 1191 (9th Cir. 2005) ("Where there is a total lack of evidence to support a factual finding, and substantial evidence to contradict it, such a finding constitutes clear error."); *Davis v. Zlatos*, 123 P.3d 1156, 1160-61 (Ariz. Ct. App. 2005).

Furthermore, to the extent that the sentencing judge's *Enmund* finding was based on the inherently contradictory testimony of Cheryl Smith, an admitted liar, any appellate court would have reversed it on that basis as well. *See, e.g.*, *United States v. Fisher*, 137 F.3d 1158, 1165 (9th Cir. 1998). Because any appellate court applying the normal standards of review would have reversed the sentencing judge's *Enmund* finding, that finding, and thus also the postconviction court's conclusion that the new DNA evidence would not have altered the *Enmund/Tison* eligibility determination, was based on an unreasonable determination of the facts. *See* 28 U.S.C. § 2254(d)(2); *Taylor v. Maddox*, 366 F.3d 992, 999-1000 (9th Cir. 2004).

Conclusion

The sentencing judge found Landrigan eligible for the death penalty because she found that he was the actual killer—even though a police crime lab technician testified that she had never examined any of Landrigan's blood and could not connect the blood on his shoes to the blood found on Dyer's body. Newly discovered DNA evidence demonstrates that Landrigan was not the actual killer in this case. The sentencing judge's eligibility determination was therefore unreasonable, and the state courts' decisions to uphold it are fraught with constitutional error. Landrigan therefore requests that this Court grant the writ of habeas corpus as to his death sentence and order the Arizona courts to conduct whatever proceedings are necessary to comply with *Enmund v. Florida*, 458 U.S. 782 (1982); *Cabana v. Bullock*, 474 U.S. 376 (1986); and *Tison v. Arizona*, 481 U.S. 137 (1987).

Respectfully submitted this 21st day of October, 2010.

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Certificate of Service

I hereby certify that on this 21st day of October, 2010, I electronically transmitted the attached document to the Clerk's office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following registrants:

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